FILE COPY

Office - Supreme Court, U. S
FILED
JAN 19 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY,
APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANT.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Appellant.

January 17, 1938.

BARNARD & MILLER, Printers, FRAnklin 0502, CHICAGO

SUBJECT INDEX.

	PAGE
OPINIONS	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ASSIGNED ERRORS URGED HEREIN	10
SUMMARY OF ARGUMENT	12
I. Pooling of traffic or earnings is lawful only when approved by the Commission with assent of all carriers involved	14
II. Meaning of the term "carrier involved"	16
Statute and dictionary definitions	16
Significance of this pooling plan	17
The plain purpose of the Act is to prevent unjust and unreasonable pools	21
III. The District Court erred in sustaining the order of the Commission and in holding that appellant is not a carrier involved	23
The phrase "all carriers involved" is not limited to include only the parties to the proposed pool	26
Appellant is a carrier involved	31
The court erred in holding that the appellant is not a carrier	32
The court erred in finding that other traffic is not disturbed by the pool	34
Actions of applicants are at variance with their contentions	36
IV. The District Court's fourteenth finding is erroneous	39
V. The certificate of abandonment should be set aside	40
CONCLUSION	41
APPENDIX	43

Cases Cited.

PAGE

Baltimore & Ohio Railroad Company v. United States, 264 U. S. 667 36

Chicago, Rock Island and Pacific Ry. Co. v. The Denver and Rio Grande Railroad Company, 143 U. S. 596 33

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 390 30

Escanaba and Lake Superior Railroad Company v. U. S., 21 F. Supp. 151 1

In Re Pooling Freights, 115 Fed. 589 27

Interstate Commerce Commission v. Baird, 194 U. S. 25 28

Union Pacific Railway Company v. Chicago, R. I. & P. Railway, 163 U. S. 564 32

Western Pacific California Railroad Company v. Southern Pacific Company, 284 U. S. 47 29

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANT.

OPINION OF THE COURT BELOW.

The opinion of the statutory three judge court has been reported in 21 F. Supp. 151 and is set out in full at pages 422-425 of the printed record. The reports of the Interstate Commerce Commission in the proceedings before that body out of which this case arises are re-

ported at 210 I. C. C. 599 and 219 I. C. C. 285. These reports appear at pages 7 to 20 and 33 to 39 of the printed record herein. The Commission's order and certificate appear on pages 20-22 of the record.

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and on October 18, 1937, this Court entered an order noting probable jurisdiction.

STATUTES INVOLVED.

In conformity with Rule 27, the language of those sections of the Interstate Commerce Act which are involved in this appeal is set forth in full in an appendix hereto.

STATEMENT OF THE CASE.

This is a direct appeal by the plaintiff below from a decree of the United States District Court for the Western District of Michigan, sitting as a specially constituted three-judge court under the Act of October 22, 1913 (U. S. Code, Title 28, Secs. 45 and 47).

The decree of the court below dismissed appellant's bill of complaint for want of equity (R. 432) and in substance approved orders of the Interstate Commerce Commission authorizing and approving (a) the pooling of certain iron ore traffic, (b) the division of earnings on certain class and commodity traffic, and (c) the abandonment of certain operations by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company over the line of railway owned by appellant from Channing, Michigan to Escanaba, Michigan.

The bill of complaint sought a decree to set aside these orders on various grounds; and this appeal rests principally on the proposition that these orders were beyond the authority of the Commission to enter, because of the limitation on its jurisdiction imposed by par. (1) of Sec. 5 of the Act.

In this statement of the facts of the case, we have adopted and followed verbatim the findings of fact of the court below,[1] except the word plaintiff has been changed to appellant; the several findings have been arranged in new order, as indicated; and four paragraphs of additional statement have been interpolated, for which record references are shown.

Appellant is a railroad company incorporated under the laws of Michigan and is engaged in the interstate transportation of freight and passengers. It owns and operates a line of railway from Escanaba, Michigan, where it connects with the Chicago & North Western Railway and extends in a northwesterly direction for a distance of approximately sixty-three miles to Channing, Michigan, where it connects with the Chicago, Milwaukee, St. Paul and Pacific Railroad.[2] It is a common carrier subject to the provisions of the Interstate Commerce Act. (Finding 1; R. 426.)

The defendants are the United States of America and the Interstate Commerce Commission. The trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company were permitted to intervene as defendants. (Finding 2; R. 426.)

---

[1] The finding of the court numbered 14 contains certain errors to which appellant has excepted (R. 436) and is not, therefore, adopted and set forth herein.

[2] The physical circumstances of the case will be more readily understood by consulting the maps which are reproduced at pages 350-A and 356-A of the printed record.

The record before the Commission and before the court shows that the appellant company was incorporated February 12, 1900. The first section of its railway, comprising the southern 31 miles from Escanaba as far as Watson, was constructed previous to 1900, primarily as a logging railroad. The western 32 miles from Watson to Channing was constructed in 1900, primarily for the transportation of iron ore and under a contract of the appellant with the Chicago, Milwaukee & St. Paul Railroad Company for a term of twenty years, expiring December 31, 1920. Appellant's entire line was made of a much heavier type than would have been necessary for logging engines and trains, and with no grades or sharp curves, for the sake of the iron ore traffic. A new contract was executed between the Milwaukee Road and the appellant upon expiration of the original contract which will expire January 1, 1951. The agreement of 1900 was made at a time when the Milwaukee Railroad foresaw and was providing for a large increase in the iron ore traffic from the Menominee Range. It had previously handled that traffic by a route southbound over its main line through Channing down to Pembine, Wisconsin, thence over the Soo Line to the latter carrier's docks at Gladstone, Michigan. (Finding 10; R. 429.)

Since the year 1909, the Milwaukee Railroad has run its ore trains from Menominee Range via Channing over the line of railway owned and maintained by appellant and to docks at Escanaba owned by the Milwaukee road, for trans-shipment via lake vessels. The tariffs of freight rates under which this ore has moved are tariffs of the Milwaukee Railroad.[3] The engines and cars are owned and the train crews are employed by the Milwaukee road. The appellant is lessor of the tracks from Channing to Escanaba, it maintains the tracks, under a high standard

[3] The record shows, however, that the Milwaukee road in publishing this tariff, has shown the appellant Escanaba and Lake Superior Railroad as a carrier participating therein. (R. 233.)

of maintenance, and it dispatches the movements of the ore trains. (Finding 11; R. 429.)

The Chicago & North Western Railway also has been a very large carrier of iron ore for many years past from the Menominee Range to Escanaba which moves over its line of railroad to Iron Mountain, Michigan, and thence eastward over a line owned by Escanaba, Iron Mountain and Western Railroad, which is a wholly owned non-operating subsidiary of the North Western, to ore docks owned and operated by the North Western at Escanaba. (Finding 12; R. 429.)

The ore traffic is an important source of income to the Escanaba and Lake Superior Railroad (R. 375, 414a), which serves some 18 communities along its line (R. 212) and the probable result of the discontinuance of the ore traffic would be the abandonment of that line west of Groos as it would not be self-supporting without that traffic. (R. 312, 364, 365, 366, 419; Exhibits 17, 18, 19, 20.)

In addition to the ore traffic, the Escanaba and Lake Superior originates and terminates a considerable volume of general traffic, a large amount of which is interchanged with the Milwaukee Road at Channing and with the North Western Line at Escanaba and which moves upon applicable joint rates. (R. 225, 226, 367, 368; Exhibits 21a, 22, 23.)

The North Western and Milwaukee Roads together received on this class and commodity traffic interchanged with the Escanaba Road, which they propose to pool, the round sum of $1,758,000 in the six years 1927 to 1932, according to their own testimony. (R. 281.) This was exclusive of iron ore. The appellant's substantial interest in the earnings on this same general interchange traffic may be illustrated by the figures for the year 1935, when they amounted to the sum of $128,591.01. (R. 422.)

Both the North Western and Milwaukee own numerous spur, industrial and sidetracks and yard facilities for the switching of cars handling ore traffic at Escanaba, Michigan, and each operates, owns and maintains large ore docks at Escanaba, where ore is transferred from cars into vessels for trans-shipment to various Lake Erie and Lake Michigan Ports *en route* to iron and steel plants. (R. 42.)

The ore docks of the Milwaukee Road at Escanaba became seriously out of repair in 1932 and since that time that road has been making use of the North Western ore docks. Thereupon, the officials of the two roads made a private study, which was completed in 1932, of the feasibility of a plan of pooling the ore traffic. This resulted in the execution of a pooling agreement. (Finding 13; R. 430.)

On March 12, 1935, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Chicago & North Western Railway Company and the previously mentioned non-operating subsidiary of the latter known as Escanaba, Iron Mountain & Western Railroad Company filed application with the Interstate Commerce Commission under which they sought an order under paragraph 1 of Sec. 5 of the Interstate Commerce Act authorizing applicants to pool ore traffic and divide the earnings therefrom, moving from the Menominee Range in Michigan and Wisconsin to the docks at Escanaba, as provided for in an agreement between the three parties, a copy of which was attached to said application. The agreement also provided for the pooling of certain substantial traffic other than iron ore from the Menominee Range,[4] namely

[4] As hereinafter discussed, the Escanaba and Lake Superior Railroad hauls a substantial volume of iron ore, originating on the Marquette Range, and delivered to it by the North Western or Milwaukee roads. This apparently comes within the provisions of paragraph 52 of the contract. The tonnages of such ore are substantial and will be found reported in Exhibits 21, 21-A and F-13. (R. 366-7, 420.)

all class and commodity traffic interchanged by the applicants with the appellant, as described, the substance of the agreement being as follows:

> "52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore, agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:" (Finding 3; R. 426.)

Subsequently, by appropriate petitions and orders the trustees, appointed by the United States Court at Chicago in proceedings under 77-B of the Bankruptcy Act, of both the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company joined in the aforesaid application. (Finding 4; R. 427.)

The aforesaid application was denied in a report (210 I. C. C. 599) and an order was entered September 24, 1935, without prejudice to a renewal if and when the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should procure from the Commission a certificate of convenience and necessity under paragraph (18) of Section 1 of the Act for the abandonment of certain operations, as contemplated by the aforesaid pooling plan. (Finding 5; R. 427.)

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on November 29, 1935, a contingent application under paragraph (18) of Section 1 for a certificate of public convenience and necessity, in substance seeking permission for abandon-

ment of operation, under trackage rights, over the line owned by the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operations of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in its application, which was docketed as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition. Thereafter, the aforesaid trustees of the property joined in said application. (Finding 6; R. 427.)

Appellant Escanaba and Lake Superior Railroad Company did not assent to the aforesaid pooling arrangement.[3] It intervened in the aforesaid proceedings and presented evidence in opposition to both applications. The Escanaba Chamber of Commerce and other organizations and representatives of the communities in the territory affected intervened and offered testimony in opposition to both applications. (Finding 7; R. 427.)

On November 18, 1936, an order was made and entered by the Interstate Commerce Commission, approving and authorizing the pooling by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees, and the Chicago & North Western Railway Company, Charles P. Megan, Trustee, and the Escanaba, Iron Mountain & Western Railroad Company (a wholly owned and controlled subsidiary of the Chicago & North Western Railway) of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, for trans-shipment beyond, and of certain class and commodity traffic, and for division of earnings there-

[3] The applicants did not consult with the Escanaba and Lake Superior Railroad concerning the proposed pooling plan (R. 130, 205); their negotiations between themselves were secret; and no other pooling arrangement, in which appellant's railway might have been employed was given serious consideration. (R. 120, 313.)

on, on terms and conditions set forth in the contract referred to in the Commission's report. On the same date, the Commission made and entered a certificate of public convenience and necessity in a proceeding entitled Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation, certifying that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights, over the appellant's line of railroad between Channing and Escanaba, Michigan, in Dickinson, Marquette and Delta Counties, Michigan. (Finding 8; R. 428.)

On December 22, 1936, appellant brought this suit to set aside the order and certificate of November 18, 1936. Answer was duly filed by the defendants and intervening defendants and hearing upon said petition was held at Grand Rapids, Michigan, January 22, 1937, before a court constituted of three judges, it having been stipulated that said hearing might be held at Grand Rapids, Michigan, in the Southern Division, instead of in the Northern Division. At said hearing there was introduced a certified copy of the evidence introduced before the Commission at the hearings held by it in the aforesaid proceedings,[6] also certified copies of certain other portions of the Commission's record in said proceedings. (Finding 9; R. 428.)

---

[6] In the printed record before this court, there has not been reproduced any of the testimony of the numerous witnesses for the communities affected, or for the Railway Brotherhoods, in opposition to the pooling and abandonment. This because appellant has withdrawn its exception that there was not sufficient testimony to support the order.

SPECIFICATION OF ASSIGNED ERRORS URGED HEREIN.

The following assignments of error are relied upon (R. 434-436).

The Court erred:

1. In dismissing appellant's complaint for want of equity.

2. In failing and refusing to enjoin, set aside and annul the order of the Interstate Commerce Commission entered November 18, 1936, authorizing the pooling by the Milwaukee Road and the North Western Line of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, and of certain class and commodity traffic, and for division of earnings thereon and in failing and refusing to set aside and annul also the certificate of the Commission made and entered the same date in Finance Docket No. 11025, certifying that the present and future public convenience and necessity permit the abandonment by the trustees of the Milwaukee Road, of operation under trackage rights over the Escanaba and Lake Superior Railroad between Channing and Escanaba, Michigan.

3. In finding and concluding as a matter of law that the order of the Interstate Commerce Commission of November 18, 1936, is within the Commission's authority under Section 5 (1) of the Interstate Commerce Act; that appellant is not a carrier involved in the pooling arrangement approved by said order; that the carriers involved in that pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement; that none of appellant's traffic and none of its earnings are to be pooled and it is not a party to

the pooling agreement; that therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under Section 5 (1) of the Interstate Commerce Act.

4. In holding and concluding as a matter of law that in making said certificate and said order approving the pooling arrangements the said Interstate Commerce Commission committed no error of law, and that both are valid.

5. In entering its finding of fact, numbered 14, correctly stating that appellant also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the appellant with each such applicant and that such agreement between the applicants, as approved by the Commission, provides for the pooling of earnings of joint traffic, and thereon erroneously finding and concluding that there is no pooling of the traffic itself or of the facilities used in moving the traffic; that there is nothing in this portion of the pooling which interferes with the interchange, routing or division of earnings allocated to appellant or with the rates on the traffic so interchanged; by the application to the respective roads of 30 per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with the appellant, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of the appellant is thereby preserved.

SUMMARY OF ARGUMENT.

[In this summary and throughout the argument which follows, for brevity the appellant will be referred to at times as the Escanaba road; the applicant Chicago, Milwaukee, St. Paul and Pacific Railroad Company (and its trustees) will be referred to as the Milwaukee road; the applicant Chicago and North Western Railway Company (and its trustees) will be referred to as the North Western road. The aforementioned Escanaba, Iron Mountain & Western Railroad Company, a subsidiary of the North Western, will be referred to as the Iron Mountain road.]

The jurisdiction of the Interstate Commerce Commission, under par. (1) of Section 5 of the Interstate Commerce Act, to approve and authorize a combination or agreement among carriers for the division of traffic or earnings is dependent upon the assent of all carriers involved.

The Commission authorized and approved a certain agreement of the applicants North Western, Milwaukee and Iron Mountain roads for the pooling of freights and division of earnings without the assent and against the protest of appellant. Appellant is a carrier involved within the meaning of the jurisdictional phrase and contends:

(a) The phrase "assented to by all the carriers involved" should be construed according to the usual and generally accepted meaning of the words.

(b) The phrase is not limited to the protection of the parties who are signatory to a proposed pooling agreement.

(c) The purpose of the phrase is the protection of any carrier from a combination by other carriers, destructive of its business. It was designed to prevent unreasonable

and unjust pooling of traffic and earnings to the detriment and without the assent of all carriers substantially affected and having an interest in the subject matter and source of the traffic.

(d) Appellant is a common carrier subject to the Act; it has been a carrier as to the ore traffic and will be deprived by this plan of its interest and participation therein.

(e) Appellant is a common carrier of the class and commodity traffic which the applicants interchange with it and appellant will be substantially affected by the proposed division of earnings thereon.

(f) Appellant is substantially affected by the whole pooling arrangement both as to the pooling of ore traffic from the Menominee Range and the division of earnings on all class and commodity traffic which the applicants interchange with appellant, both features considered together or separately.

(g) The sum and substance of the entire plan proposed by the applicant carriers is the elimination of appellant and nullification of the contract under which appellant's railroad was constructed. The substantial portion of appellant's railroad was constructed under a contract with the Milwaukee road for the primary purpose of transporting the iron ore from the Menominee Range. By constructing its railroad under the terms of this contract, it is submitted that the appellant obtained an interest in the ore traffic in common with that of the Milwaukee road and the Milwaukee road cannot now be permitted to maintain to the contrary.

The abandonment of certain operation, for which the Commission issued a certificate of convenience and necessity, was applied for contingent upon the lawful approval of the pooling arrangement. As the pooling arrangement should be disapproved, the certificate of abandonment should be canceled.

I.

Pooling of traffic or earnings is lawful only when approved by the Commission with assent of all carriers involved.

Combinations for the pooling of railroad traffic or earnings were originally specifically forbidden by Section 5 of the Interstate Commerce Act,[7] which declared:

> "it shall be unlawful for any common carrier subject to this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof";

This absolute prohibition remained in full force and without exception until the Transportation Act of 1920, by which a proviso was added to Section 5:

> "That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

The application to the Commission, which resulted in the order here under attack, was brought under this proviso.

[7] The language here quoted is from the present Act. It corresponds with the original language as found in the 1887 enactment of the Act to Regulate Commerce, excepting that the words "subject to the provisions of this act" were used instead of the present words "subject to this act".

to escape the general prohibition against pooling agreements, and it is from the proviso that the authority of the Commission is derived.

In thus extending the power and authority of the Commission in this class of cases, the Congress saw fit to circumscribe that authority with definite requirements limiting its exercise. Thus it is to be noted that the approval of the Commission must come "after hearing", and that it must be based upon findings that the division of traffic or earnings will be in the interest of better service to the public, or economy in operation; that competition will not be unduly restrained; and that the terms and conditions, and the consideration between the carriers, are just and reasonable in the premises. Having so found, the Commission may then authorize and approve such division of traffic or earnings, "if assented to by all the carriers involved". By this final qualification Congress has imposed an absolute limitation upon the authority of the Commission which effectively forestalls any pooling arrangement not assented to by all the carriers involved. The Escanaba railroad, appellant herein, is seriously and adversely affected by the pooling arrangements; it contends that it is such a "carrier involved", and that since its consent to the proposed pooling arrangement is not given, the Commission had no authority to approve such an arrangement.

The Commission rejected this contention and approved and authorized the proposed pool over the protest of the appellant, whereupon this suit was brought. There is now no question before the Court which calls for the exercise of expert discretion or judgment and the ultimate question which is presented is one of statutory construction. The decision of that question is within the sole province of the courts and the construction adopted

by the Commission is not authoritative or binding upon the courts or on the parties.

II.

Meaning of the term "carrier involved."

The problem of particular statutory construction here presented is one which has never before been considered judicially. We are mindful of the important function which we here invoke, capable as it is of defeating or effectuating the purpose of the legislative branch of government. To aid this Court to interpret correctly the language used by Congress, therefore, we respectfully direct attention to the application of recognized methods of statutory construction based upon reason and experience. In addition to the apparent meaning of the phrase, taking the words as used in their common sense and observing the elementary rules of grammar, the Court may also properly consider the context in which it is used. Other sections of the Act may serve to reveal a policy and purpose on the part of Congress which will indicate further the legislative purpose in using the phrase under scrutiny. Whatever process of reasoning is followed, the important inquiry must be as to the legislative intent.

STATUTE AND DICTIONARY DEFINITIONS.

The language employed in the statute must be given the usual and accepted meaning.

The term "carrier" as used in the Interstate Commerce Act, is expressly defined in paragraph (3) of Section 1 as reproduced in the appendix hereto.

The word "involved" is not defined in the Act itself and appears in one other section only. (Sec. 213, (3), (e).)

Turning to the dictionaries ordinarily consulted for the commonly accepted meaning of words, we find the following definition of the word *involve* in the *Oxford English Dictionary:*

"d. To include or affect in its operation."

SIGNIFICANCE OF THIS POOLING PLAN.

In any litigated case a necessary corollary to the question of statutory construction, is the question of application of the statute to the situation presented by the record, which is indeed merely a different approach to the same problem, and because the only present practical importance of the statute lies in its effect upon this case. The facts of the case therefore become of vital importance in that they either present a situation within the purview of the statute or they do not. Thus the question in this case is whether the appellant is a carrier involved, which is to say, did Congress intend, under the circumstances presented, to require the consent of this carrier to the pool proposed by the applicant carriers.

In the past the Milwaukee and North Western railroads have both served as originating carriers from the mines on the Menominee Range, and have competed for the traffic. Ore shipped over the Milwaukee goes to Escanaba by way of Channing and over the tracks of the Escanaba Railroad from Channing to Escanaba. The North Western road trains run from the mines to Escanaba via Iron Mountain; and from Iron Mountain to Escanaba the trains move over the rails of the Iron Mountain road, the North Western's wholly owned subsidiary. These carriers have likewise competed for traffic originating at or destined to Escanaba and points local to the Escanaba Railroad, which traffic is interchanged

with the North Western at Escanaba and with the Milwaukee at Channing.

For the future, the purpose and result of the pooling plan is that practically all of the ore will be hauled by the North Western from the mines, whether in the Iron River, Crystal Falls, Stambaugh or Iron Mountain-Norway local areas, and will move via Iron Mountain and thence over the rails owned by the Iron Mountain road to Escanaba for loading into lake ore boats at the North Western docks. The Milwaukee road will move ore only from the relatively unimportant Amasa area (the North Western abandoning its Amasa branch), and this ore instead of moving via Channing, thence direct to Escanaba, will be taken into Iron Mountain and thence go via North Western (Iron Mountain road rails) to the Escanaba ore docks (R. 158-9).

The stated purpose of this arrangement is better service and economy of operation. Peculiarly enough, however, the economy of operation is produced by two features, wholly disassociated with the road haul movement; first, the elimination of duplication of service at the mines and, second, the elimination of duplicate ore docks at Escanaba. There is no possibility of any resultant economy through moving the road haul trains over the Iron Mountain railroad, instead of over the Escanaba road, and none has been established.

The fact is that this pool of ore traffic grew out of negotiations begun by the Milwaukee for the purpose of gaining the use of the North Western docks at Escanaba by reason of the fact that the Milwaukee docks were in bad repair and the Milwaukee could not afford to build new ones. Despite the obvious fact that a pooling arrangement which included the appellant in the road haul would be feasible and would produce the same economies as

the present one (R. 298), the only plan which the North Western would go along with and the only way the Milwaukee could get the North Western to let them use its docks at Escanaba was the present one, namely, in which the ore all moved into Escanaba over the North Western tracks (R. 313, 130).

The fact is obvious that such an arrangement could have only one effect as concerned the appellant; namely, the destruction of its business with the resultant necessary abandonment of at least that part of the line west of Groos,[7] the major portion of which was originally built to accommodate the ore traffic and which could not be self sustaining without the revenue from the ore traffic.

The applicant carriers not only realized but intended that this result should obtain; the applicants further realized that the appellant would no longer be able to interchange at Channing with the Milwaukee but would necessarily connect only with the North Western at Escanaba (R. 282). The Milwaukee therefore insisted (R. 144, 175) on the inclusion in the agreement of paragraphs 52-55, which provided for a pooling between the North Western and Milwaukee of the earnings from traffic interchanged with the appellant and a division thereof on a fixed percentage basis[8] (R. 282).

---

[7] Groos is a point just beyond the Soo Line crossing, in the direction of Channing (R. 262), and is described in the part of the record which was not printed on appeal. Local conditions along the line west of Groos are outlined or described (R. 216) and the traffic originating on the Escanaba road west of Groos is tabulated in Exhibits 22 and 23 (R. 367-8).

[8] In examining the provisions of the pooling agreement, it is important to follow the language of the contract as finally approved and executed, appearing as Exhibit 1 (R. 316-350). This contains certain vital clauses (including Section 55), not appearing in the original draft, which was annexed to the application to the Commission and which is also reproduced of record. (R. 49-67.)

Paragraph 52 thus candidly recites, as inducement, that

> "By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the E. & L. S. if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenues if this arrangement is put into effect."

By pooling these earnings and dividing them on a basis arrived at by a study of past experience, under the arrangements now existing, the Milwaukee will be kept whole and will not lose anything by this feature of the plan in the future, even though the North Western receives from appellant the interchange traffic which the Milwaukee now enjoys.

Paragraphs 53 and 54, provide further for what the applicants correctly considered the not too remote possibility of the North Western acquiring the tracks or terminals of the appellant. The Milwaukee will continue to receive, under the contract, its share in the earnings even though the North Western acquires the property of the appellant; and if the terminals of the appellant are acquired by the North Western, the applicants, Milwaukee and Northwestern, will submit to arbitration the question as to how much the North Western should pay the Milwaukee as divisions of earnings arising out of what had formerly been interchange business.

Paragraph 55 of the agreement[9] completes the picture by providing for the establishment of appropriate through rates and divisions for handling interline traffic via Iron Mountain so as to permit the Milwaukee to continue handling business to and from industries served by the appel-

[9] The provisions of paragraph 55 do not appear in the original draft of contract, attached to the application to the Commission. It was subsequently added and appears in the contract finally signed. (R. 339.)

lant either direct or through reciprocal switching arrangements with the North Western.

This feature, while innocent in terms when taken by itself, is part and parcel of the ore pooling plan. As such its vicious character as regards the appellant becomes plain. For appellant's connection with the Milwaukee having been effectively broken by the ore traffic pool, appellant's service will then be confined to the relatively short haul from Watson or Groos into Escanaba or even to a mere switching service at Escanaba. The applicants will pool not only their own earnings on the interchange traffic but also a large part of appellant's former share which it will not then be able to earn. In 1935, appellant's share amounted to nearly $140,000. (R. 422.) Thus while the Milwaukee and North Western have amply protected their own individual interests by agreement, the Escanaba road is to be relegated to the position of a mere switching line at Escanaba with, perhaps, a short spur to Watson or Groos. With its operations thus limited and its principal business destroyed, the applicants contemplated it may soon become so subservient financially that it will be taken over by the North Western as a branch line. We submit that, in equity, this is an unjust and unconscionable result in total disregard of appellant's property rights.

THE PLAIN PURPOSE OF THE ACT IS TO PREVENT UNJUST AND UNREASONABLE POOLS.

Section 1 (4) of the Interstate Commerce Act provides that every carrier shall provide equitable divisions of joint rates as between carriers participating in such rates, which shall not unduly prefer or prejudice such participating carriers. Section 3 (3) prohibits discriminations in rates between competing connecting lines and forbids undue prejudice to any connecting line in the distribution of traffic. Section 15 (4) forbids the establishing by the

Commission of through routes at the expense of short hauling a carrier without that carrier's consent.

Each of these sections is directed against a specific practice and none of them would afford an efficient vehicle for escape from such an unjust situation as that in which the appellant is involved. However, taken as illustrative of congressional policy, we respectfully submit that, collectively and individually, they evidence a concern on the part of Congress for the individual interests of competing railroads and point to a general policy of prohibiting unfair discriminations among railroads. In harmony with this policy, Congress thus provided that the approval of traffic or money pools by the Commission must be with the "assent of all carriers involved" and, further that the terms and conditions of the plan, and the consideration as between the carriers "shall be found by the Commission to be just and reasonable in the premises." It seems inescapable that the provision requiring the consent of carriers involved in pooling arrangements was born of the same concern for justice and fairness and that to hold that the appellant in this case is not a carrier involved would be to permit a result inconsistent with the plain intent of the statute.

We submit that, in the light of the foregoing facts and their practical significance, the appellant railroad is a "carrier involved" within the meaning of the statutes; that is to say that Congress intended by using the phrase "if assented to by all carriers involved" to protect a carrier situated like the appellant from the imposition of a plan such as the one here approved by the Commission over its protest.

III.

The District Court erred in sustaining the order of the Commission and in holding that appellant is not a carrier involved.

We should first consider what the Court and the Commission said in their respective opinions, concerning this jurisdictional question.

In its final report, the Commission decided for itself the question of law presented, refused to recognize this limitation upon the authority delegated by section 5 (1) of the Act, and proceeded to approve the abandonment and pooling plan proposed in the application. In so disposing of the contention of the Escanaba road the Commission said (R. 19, our italics):

> "Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement. One of these is that the agreement must be 'assented to by all the carriers involved * * *.' The Escanaba Company contends that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement. It is therefore necessary to determine whether the Escanaba Company is a carrier involved within the meaning of the act. As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows there[10] that *the*

[10] As this decision is reported in the Commission's bound volumes, 219 I. C. C. 285, 295, the word "here" is used in this sentence instead of the word "there". In the preceding sentence, the word "agreement" appears in plural form, "agreements".

carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard."

The Commission further observed (R. 18) that as to the pooling of earnings from interchange traffic:

> "The pooling plan as to traffic other than the ore traffic is intended as insurance of revenue to the Milwaukee[11] which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public; that costs of operation will be reduced, or that competition will be unduly restrained. However, *according to the record, the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present.*"

The District Court apparently subscribed completely to the view of the Commission, for it adopted that view without further analysis of the question and held (R. 425):

> "Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the inter-

[11] In the decision as reported in 319 I. C. C., at page 294, the phrase "is intended as insurance of revenue to the Milwaukee" has been changed to read "is intended as insurance to the Milwaukee of revenue".

change of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that *plaintiff is not a carrier of the ore traffic.* We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. *Other traffic interchanged at Channing with the Milwaukee is not disturbed* by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway."

Subsequent to the rendition of its opinion, the court entered formal conclusions of law, (to which appellant has assigned error) including the following (R. 430):

"2. The Commission's order of November 18, 1936, is within its authority under section 5(1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5(1) of the Act."

THE PHRASE "ALL CARRIERS INVOLVED" IS NOT LIMITED TO INCLUDE ONLY THE PARTIES TO THE PROPOSED POOL.

At the outset it is to be noted that both the Commission and the Court said that the carriers involved in the pooling arrangement are the carriers which are parties to that agreement. It is not entirely clear either from the report of the Commission or from the opinion of the Court whether it was meant thereby that the phrase "carriers involved" necessarily includes only the parties to the agreement; and we conclude that it was not so meant. Indeed to have so held would have been manifestly erroneous.[12]

The language of the statute must be given its usual and accepted meaning. The words "carrier" and "involved" are not words of art, having a legal significance not related to their common use; they are not so used in the statute. And conceivably, had Congress intended that the consent only of the participants in a prospective arrangement should be required, it would have used a phrase so designed as to convey that meaning. It would have said so, in so many words. Grammatically the statute is unambiguous. It provides that the Commission may authorize, if assented to by all carriers involved, such divisions of traffic or earnings. From this it is clear that the carriers whose assent must be had, are those involved in the divisions, and whose traffic or earnings are affected, not merely the participants in any *proposed* arrangement or agreement or contract, for it is the division of traffic or earnings which the Commission approves.

[12] We are here considering the language of the opinion of the District Court. (R. 425.) In point of fact, however, in the second of the formal Conclusions of Law subsequently entered by the court, after receiving suggestions of counsel (R. 430), it would appear that the phrase had been applied as meaning that appellant is not "involved" solely because it is not a party to the agreement.

Obviously Congress did not so limit the phrase and to so construe it would be to fly in the face of the legislative intent, because the term "pooling" itself implies a voluntary concert of action. *In Re Pooling Freights,* 115 Fed. 589. The parties to the agreement necessarily must have assented thereto or they would not be parties to the agreement. Thus to so limit the phrase would be to render it mere surplusage, without any substantive meaning or practical effect.

Furthermore, the fact that appellant is not a party to the agreement and therefore not a carrier involved, (if we accept the narrow meaning above described), is the consequence only of the refusal of the defendant carriers to not include it in their negotiations. They admit, as we have seen, that another agreement might have been entered into in which the appellant would have been a necessary party, and that the same economies might have been made thereby. It is significant that the North Western and Milwaukee made the Iron Mountain road a party to the pool and to the application, and thereby indicated undeniably that appellant (which, as an operating carrier, is much more involved as a practical matter than the non-operating Iron Mountain), could very well have been made a party to the prospective plan. We submit that the arbitrary and selfish whim of the proponents of a pooling arrangement is not the test for determining whether the consent of a third carrier is required by the statute.

On the contrary, we submit that the phrase here under consideration was designed for the protection of any carrier having a substantial interest in the subject matter of the pool, or who is affected by it, and that the true purpose of the provision is to prevent exactly what is transpiring in this particular case, *i. e.*,—to prevent any group of transportation systems from combining by agree-

ments of this character against the interest of other carriers, without their assent, which might be obtained by some corresponding beneficial arrangement preserving the economic life of the carrier so involved.

In the plain meaning of the phrase a carrier is involved if it has a substantial interest in the subject matter of the pool. For as this Court said in *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, at page 47:

> "There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained."

In the court below, it was suggested by appellees that to hold the Escanaba railroad to be a "carrier involved" as to the class and commodity traffic interchanged between it and the North Western and Milwaukee roads, or is in the proposed division of earnings on such traffic, would have the practical result of nullifying the purpose of the 1920 amendment to paragraph (5) of Section 1. This for the claimed reason that no such pooling could ever then be authorized by the Commission unless practically all the carriers of the United States assented thereto, on the theory that conecting carriers in joint through traffic would generally be within the meaning of the term "carriers involved", so construed. By an attempted *reductio ad absurdum,* they sought to show that the result of holding in favor of the plaintiff herein would be to nullify the legislative expression in the statute. For as they say, if the appellant is a "carrier involved" in the pooling of the earnings of the North Western and Milwaukee on traffic handled jointly with the Escanaba railroad, then it must logically follow that any railroad connecting with the North Western and Milwaukee is also a "carrier involved." We submit that this does not follow at all,

and for the simple reason that connections of the Milwaukee and North Western railroads at Chicago, for example, in point of fact would have no real interest in any pooling of earnings as between the North Western and Milwaukee roads, and would not be affected in any substantial respect by such pooling. On the other hand, looking at the plan as a whole, we have seen what a substantial and immediate interest the Escanaba road has in the source of the traffic and in the subject-matter of the pool.

This community of interest effectively distinguishes it from a mere connecting carrier.

Indeed, the sole test set up by the plan itself as to whether the earnings on class and commodity traffic are or are not to be pooled, is whether such traffic is interchanged with the Escanaba railroad. It seems hard to imagine that where a participation of a road is a test for determining the operation of a pool, that it is not, however, to be regarded as affected or involved in such pool.

We further suggest that the scope of the term "all the carriers involved," as used in this section of the statute, is generally coincident with that of the term "any party in interest," used in paragraph (20) of section 1 of the Act, in the provision reading:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, * * * or any party in interest."

This latter term has been construed by the Supreme Court in *Western Pacific California Railroad Company* v.

Southern Pacific Company, 284 U. S. 47, 76 L. ed. 160. In the course of the opinion, the court said:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 448, 67 L. ed. 1078, 1085, 43 S. Ct. 597. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

Again, in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, at page 390, 76 L. ed. 808, at page 814, the court construed and applied the same foregoing statutory reference to "any party in interest," saying that in view of previous cases:

> "it must be held that appellant is a 'party in interest' within the meaning of the statute capable of in-

> stituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

There would seem to be no sensible reason for holding that in a situation like this, the Escanaba railroad has a sufficient interest to qualify it as a party in interest to the abandonment application, but, on the other hand, that it is not one of the carriers involved and that, therefore, its assent to the pooling plan is not essential.

Appellant is a carrier involved.

As we have observed above, the District Court in its written opinion did not expressly rest its conclusion upon the proposition that the only carriers involved are the carriers which participate in the prospective arrangement, although its fourteenth finding and second conclusion of law clearly suggests that view. On the other hand, neither did it suggest any test or criterion which would indicate any other concept of the statutory limitation upon the Commission's authority. Instead it followed closely the line of simple legalistic reasoning by which the Commission had arrived at its conclusion.

Reduced to essentials, the Court simply stated that the appellant is not a carrier of the ore traffic, that other traffic was not disturbed by the pooling arrangement and that therefore it was not a carrier involved in the pool. It apparently recognized, though it did not give any strong clue as to what it thought the statute meant, that if the appellant was a carrier of the pooled traffic and if its interest or participation therein were disturbed by the pool it would be a carrier with respect thereto and also involved therein.

THE COURT ERRED IN HOLDING THAT THE APPELLANT IS NOT A CARRIER.

There is no question but that appellant is a common carrier subject to the provisions of the Act and the Commission and the Court have so found. Unlike the Iron Mountain road, it is not a non-operating company but on the contrary it is engaged in the transportation of passengers and property in interstate commerce.

It does not lose that status by reason of the arrangement with the Milwaukee road, whereby trackage rights are granted to that road for the hauling of ore traffic from the Menominee Range. For despite the fact that the Milwaukee road furnishes the engines and cars and employs the train crews, the Escanaba road furnishes the roadbed and track and performs the dispatching and signaling services controlling the movements of the trains.

The District Court's holding that the Escanaba road was not a carrier of the ore traffic (R. 425) was predicated upon the fact that the ore was carried by the Milwaukee in its own cars, with its own locomotives, in trains operated by its crews and under rates in which the Escanaba road did not participate.

There is no dispute as to these facts. But the Court erroneously emphasized the use of the cars and locomotives of the Milwaukee road as indicating that that road is the sole carrier as to the ore traffic via Channing. In *Union Pacific Railway Company* v. *Chicago, R. I. & P. Railway,* 163 U. S. 564, 16 Sup. Ct. 1173, under factually similar circumstances to those in this case, this Court held that the contract for joint use of the Union Pacific tracks was not *ultra vires* but that as to the operation under that contract the Union Pacific maintained its status even though the rolling stock was that of the Rock Island

lines, because the Union Pacific controlled the movement of the trains and furnished the dispatching and signalling. See also *Chicago, Rock Island and Pacific Railway Company* v. *The Denver and Rio Grande Railroad Company*, 143 U. S. 596, 36 L. ed. 596.

The important point is that by controlling and regulating the movement of trains in interstate transportation, as well as furnishing and maintaining the "railroad", *i. e.*, the instrumentalities and facilities of transportation, the appellant is performing the functions of a carrier as much as if its cars and engines also were used. Its part in the transportation is basically more important than the mechanical operation of the trains. (See paragraphs (3) and (4) of Section 1 of the Interstate Commerce Act.)

Assuming, *arguendo*, that the Court correctly held that the appellant does not participate as a carrier and that it must so participate if it is to be regarded as a "carrier involved," it must be recalled that the pooling arrangement involves not only the ore traffic from the Menominee Range moving over the rails of the Escanaba road, but involves also a very large volume of carload traffic interchanged by the Escanaba road, either with the North Western road through Escanaba, or with the Milwaukee road through Channing.

This interchange traffic is of considerable volume, affording substantial annual revenues to the parties concerned, and is of two descriptions: The *first*, is of ore originating on the Marquette Range, and of which from 200 to 800 carloads per year are exchanged by the appellant chiefly with the North Western road, under joint rates applying thereon (R. 366-7, 241); and *second*, class and commodity traffic in general (R. 308, 422). The earnings on all of this traffic are to be divided between the

North Western and Milwaukee, which have heretofore competed in such transportation.

As to this traffic the appellant is undeniably a carrier in the most strict sense of the term, since it concurs in the rates, moves the traffic in its own equipment, with its crews and engines, and assumes every attribute of the common carrier.

It would be difficult to see how any common carrier could be more practically and legally affected by the pooling arrangement, as regards the ore traffic. It is even more difficult to see how any carrier could need protection more than this appellant and yet not be considered a carrier affected by such pooling agreement.

THE COURT ERRED IN FINDING THAT OTHER TRAFFIC IS NOT DISTURBED BY THE POOL.

It should be emphasized that the pooling arrangement involves not only the ore traffic from the Menominee Range moving over the rails of the Escanaba road, but involves also aforesaid large volume of carload traffic interchanged by the Escanaba road either with the North Western road through Escanaba, or with the Milwaukee road through Channing.

The Court tacitly recognized this fact but reasoned that this "other traffic is not disturbed by the pooling arrangement," thus indicating apparently that, though the appellant might be a carrier of that traffic, it was not involved in the pool. In so holding the lower Court committed a plain error of fact and failed entirely to recognize the obvious significance of the pooling arrangement.

Obviously, in and of itself, the agreement between the North Western and the Milwaukee to pool their earnings on traffic interchanged with the appellant does not result

automatically in a direct increase or diminution of the volume of that traffic, though as we will point out below, that feature of the plan alone will have a definite adverse effect upon appellant, which necessarily involves it in the pool.

The fact is, however, as the Commission said (R. 18):

> The pooling plan as to traffic other than the ore traffic is intended as insurance of revenue to the Milwaukee which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public; that costs of operation will be reduced * * *.

And, as we have seen, it will be the inevitable result of the present pooling plan; which is expected by all parties thereto, that the connection of the Escanaba road with the Milwaukee at Channing will be necessarily broken because of the diversion of the ore traffic. Thus, all the class and commodity traffic now interchanged at Channing will necessarily move via the North Western at Escanaba and to hold otherwise is to ignore the express provisions of the agreement between the North Western and the Milwaukee.

It is unquestionably true, therefore, that this traffic *will be disturbed* and that the appellant is involved in the pool in that it will for the future be limited to an interchange of traffic with the North Western at Escanaba.

The appellant is further involved in that feature of the pooling plan which relates to the pooling of earnings from traffic of which it is a carrier, because of the *direct* effect which that pool will have upon the appellant's participation in that traffic. This because the pool has the

direct consequence of wholly eliminating all competition for that traffic.

This is not to say that the finding of the Commission as to the effect of the pooling plan upon competition is necessarily erroneous.

The Commission gave no consideration at all to the effect upon appellant of the elimination of competition between the applicant carriers. Because the appellant was not a party to the agreement, the Commission did not consider at all the justice and reasonableness of the terms and conditions of the proposed plan as it affected the appellant. Its finding, therefore, bears only upon the restraint of competition as between the Milwaukee and North Western in its relation to service to the public. From the standpoint of the appellant, however, the elimination of this competition necessarily will have disastrous results.

That these results do obtain, simply from the restraint of competition, this Court will readily observe. For, we submit, a complete lack of incentives on the part of applicants to accord the appellant beneficial treatment in the interchange of traffic, coupled with a complete loss of bargaining power on the part of the appellant, cannot but work to the detriment of appellant's business as a railroad. *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 667, 68 L. ed. 258.

ACTIONS OF APPLICANTS ARE AT VARIANCE WITH THEIR CONTENTIONS.

The contention of the applicant railroads that the Escanaba road being only lessor or grantor of trackage rights may not therefore be considered as one of the "carriers involved," is inconsistent with and contradicted

by the actions of the applicants themselves. The Escanaba, Iron Mountain & Western Railroad Company is owner of the line from Iron Mountain to Escanaba, over which the North Western ore trains have moved and will continue to move under the pooling arrangement *en route* to the docks. That company is not an active common carrier as to any traffic whatsoever, and is simply and exclusively the owner and lessor of the line in question. In this respect, therefore, appellant is much more involved as a carrier than is the Iron Mountain. Nevertheless, the Escanaba, Iron Mountain & Western Railroad Company is a party to the pooling agreement, and it is one of the applicants who sought and obtained from the Commission approval of and authority for the pooling arrangement. (R. 41.)

This is admitted in the answer filed by the defendant Interstate Commerce Commission, in the court below. (R. 25.)

The order entered by the Commission authorizing and approving the pooling plan names the Escanaba, Iron Mountain & Western Railroad as one of the carriers involved. It reads (R. 21):

> "*It is ordered*, That the pooling by the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George L. Haight, trustees, of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract referred to in the report, be, and it is hereby, approved and authorized."

Although the Iron Mountain road is a wholly owned subsidiary of the North Western road, it is to be noted that corporate action by the Iron Mountain directors was obtained, approving the plan, and applicants made a point of this in the record before the Commission. (R. 130) It is quite apparent, therefore, that the principal applicants at one time, at least, had a very different idea as to what constituted a "carrier involved" under the statutory clause in question, from the concept they urged upon the Court below.

The entire western half of appellant's railroad was constructed for the primary purpose of transporting this Menominee Range ore in cooperation with the Milwaukee road. And under a long term contract between the two roads, the line of railroad, consisting of tracks, switches, water tanks and other facilities and instrumentalities owned by appellant, have been utilized in the transportation of this ore to Escanaba. The result of the pooling plan as approved by the Commission will be the abandonment of these facilities and instrumentalities owned and maintained by appellant as to their principal purpose and use. Indeed, by the terms of the formal agreement, as approved by the Commission, the parties thereto have joined in the express covenant that "the Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad." (R. 337.)

Upon these facts, bearing in mind the broad language of paragraphs (3) and (4) of Section 1 of the Act, we submit it cannot properly be contended that this carrier is not substantially affected by the proposed plan, as a carrier, or that it is not in the real sense of the term "a carrier involved" in the pooling of the iron ore traffic.

IV.

The District Court's fourteenth finding is erroneous.

In paragraph 5 on page 11, *supra*, we have restated appellant's specific assignment of error directed to certain features of the findings of fact entered by the District Court as No. 14. (R. 430.)

In short, appellant contends that the District Court erred when it concluded, as to the general class and commodity traffic interchanged by the Milwaukee and North Western roads with the Escanaba road, (a) that there is no pooling of the traffic itself or of the facilities used in moving the traffic; (b) that there is nothing in this portion of the pooling which interferes with the interchange, routing or division of earnings allocated to appellant, or with the rates on the traffic so interchanged; and (c) that by the application to the respective roads of thirty per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with the appellant, so that competition between the Milwaukee and the North Western on traffic originating and terminating on the line of appellant is thereby preserved.

These three phases of finding No. 14 disregard the real purpose and contemplated result of sections 52 to 55 of the contract, and of the agreement as a whole, matters which are sufficiently presented in the preceding chapter of this brief and these conclusions rest on the erroneous assumption that the fundamental conditions in the situation of the Escanaba road will not be vitally affected by the pooling contract in its entirety, and in particular by section 52.

Moreover, as to (a), the specific terms of the formal contract clearly contradict the statement that there is to

be no pooling of the traffic itself, or of the facilities used in moving the traffic.

As to (b), it is an unwarranted assumption that the traffic will not be disturbed. Indeed, the Commission in its report qualified the conclusion that the earnings of the Escanaba Company and the services to the public would in no way be affected, by adding the words "so long as traffic originating at, or destined to points on the Escanaba *is handled as at present*".

Furthermore, as to (c), the application to the respective roads of thirty per cent of their earnings on the interchange traffic, at best would simply represent the out of pocket cost of moving such traffic[14]; and manifestly the receipt of mere out of pocket cost furnishes no incentive whatever for any carrier to compete for any traffic.

V.

The certificate of abandonment should be set aside.

The order and certificate of the Commission, under Finance Docket No. 11025, as a part of this whole arrangement, authorizes the abandonment by the Milwaukee road of operations under trackage rights over the line owned by the Escanaba road.

The application on which this certificate of convenience and necessity was entered was a contingent application, strictly conditioned upon the authorization and effectiveness of the pooling arrangement (R. 84).

In the court below appellant asserted that there was no substantial evidence to support the order of the Commission; and as the printed record before this court shows, the abandonment was opposed by representatives of the

[14] This is clear from the specific language of the contract itself, for section 52 reads: "less an amount of thirty per cent of such gross revenues to cover cost of handling by either company".

communities affected and by every interest appearing in the case, other than the applicants Milwaukee road and the North Western. We have withdrawn the assignment of error against the sufficiency of the evidence to support the Commission's order, recognizing that it takes but little more than a scintilla of evidence to support a finding of fact of the Commission.

If the order authorizing and approving the pooling arrangement is held to be beyond the Commission's jurisdiction, as herein claimed, we submit it must follow that the certificate of convenience and necessity authorizing abandonment must fall.

The decree of the statutory court was founded on substantial errors in construction and application of the statute, as we submit, and therefore we respectfully ask that the cause be remanded with instructions to enter a decree setting aside the orders and certificate of the Commission on the jurisdictional grounds stated.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Appellant.

January 17, 1938.

APPENDIX.

The Interstate Commerce Act

(Being the Act to Regulate Commerce as Amended)
U. S. Code, Title 49, Chapter 1.

Section 1.

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

* * * * *

(3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or arti-

ficial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the car-

riers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

* * * * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect

to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 3.

(3) All carriers, engaged in the transportation of

passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 5.

(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of

traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

Section 15.

(4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.